workers' compensation board

Tribunal Task Force

final report

• October 29, 2001 •

Alberta
HUMAN RESOURCES
AND EMPLOYMENT

103-01884/

INTRODUCTION

This is the report of the Workers' Compensation Board (WCB) Tribunal Task Force established by the Alberta Government in July 2001. The Task Force was mandated to develop a proposal for the criteria and process of a one-time tribunal to review long standing, contentious WCB claims.

BACKGROUND

The WCB Tribunal Task Force and the establishment of the tribunal is part of the government's response to two reviews of Alberta's workers' compensation system. The reviews were conducted by two committees: the MLA Workers' Compensation Board Service Review Input Committee, chaired by Victor Doerksen, MLA, Red Deer-South; and the Review Committee of the Workers' Compensation Board Appeals System, chaired by retired Judge Samuel Friedman, Q.C.

During their consultations both committees heard from workers who had long standing, unresolved WCB claims, and who felt that they had not received the benefit of due process.

Among the 59 recommendations of the review committees was a call for the establishment of a one-time independent tribunal to resolve long standing, contentious claims. The committees also made recommendations in the areas of: accountability of the Workers' Compensation Board and the Appeals Commission; WCB decision-making; independence of the appeals system; and the appeals process. Many of these recommendations have been accepted by government and are being implemented.

MEMBERSHIP

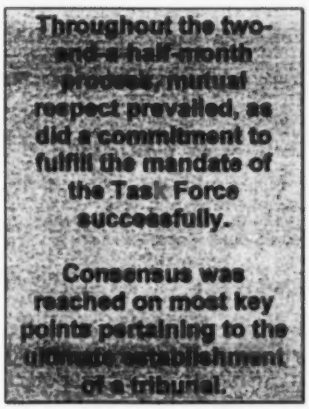
The Tribunal Task Force was composed of eleven volunteers appointed to represent the interests of labour, employers, the WCB, the community, injured workers and Alberta Human Resources and Employment. To ensure balance, the Task Force was co-chaired by both an employee and employer representative. A list of the membership, including brief biographies, is provided in the Appendix.

MEETINGS/METHODOLOGY

A copy of the Terms of Reference for the Task Force is provided in the Appendix.

Since their first meeting on August 2, 2001, the Task Force met nine times. Discussions were often prolonged and challenging, particularly given the range of interests represented at the table. Such interests pertained largely to the process and desired outcomes of the tribunal. The Task Force agreed the initiative should be:

- Fair;
- Cost effective;
- Timely;
- Consistent with the Workers' Compensation Act, WCB policy and legislation at the time of injury;
- Final;
- Able to increase public and stakeholder confidence in the WCB system;
- User-friendly;
- Transparent;
- Easily accessible;
- Respectful of all parties;
- Manageable; and
- Would not compromise the Meredith principles (*A copy of the Meredith principles is provided in the Appendix.)*


Throughout the two-and-a-half-month process, mutual respect prevailed, as did a commitment to fulfill the mandate of the Task Force successfully.
Consensus was reached on most key points pertaining to the ultimate establishment of a tribunal.

In developing the proposed criteria and process for the tribunal, the Task Force considered a variety of options. Members worked to build consensus by carefully weighing the overall fairness, reasonableness and feasibility of each alternative. The Task Force agreed the tribunal should be viewed as an opportunity to resolve long standing, contentious WCB claims.

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RECOMMENDATIONS

The Task Force discussed how far they should go in determining the process details for the tribunal. Members worked to develop principles by which the tribunal should be guided. This approach should allow the tribunal some logistical flexibility in meeting their own objectives. The following recommendations pertain, but are not limited to:

- criteria for determining access to the tribunal; and
- process for reviewing cases brought before the tribunal.

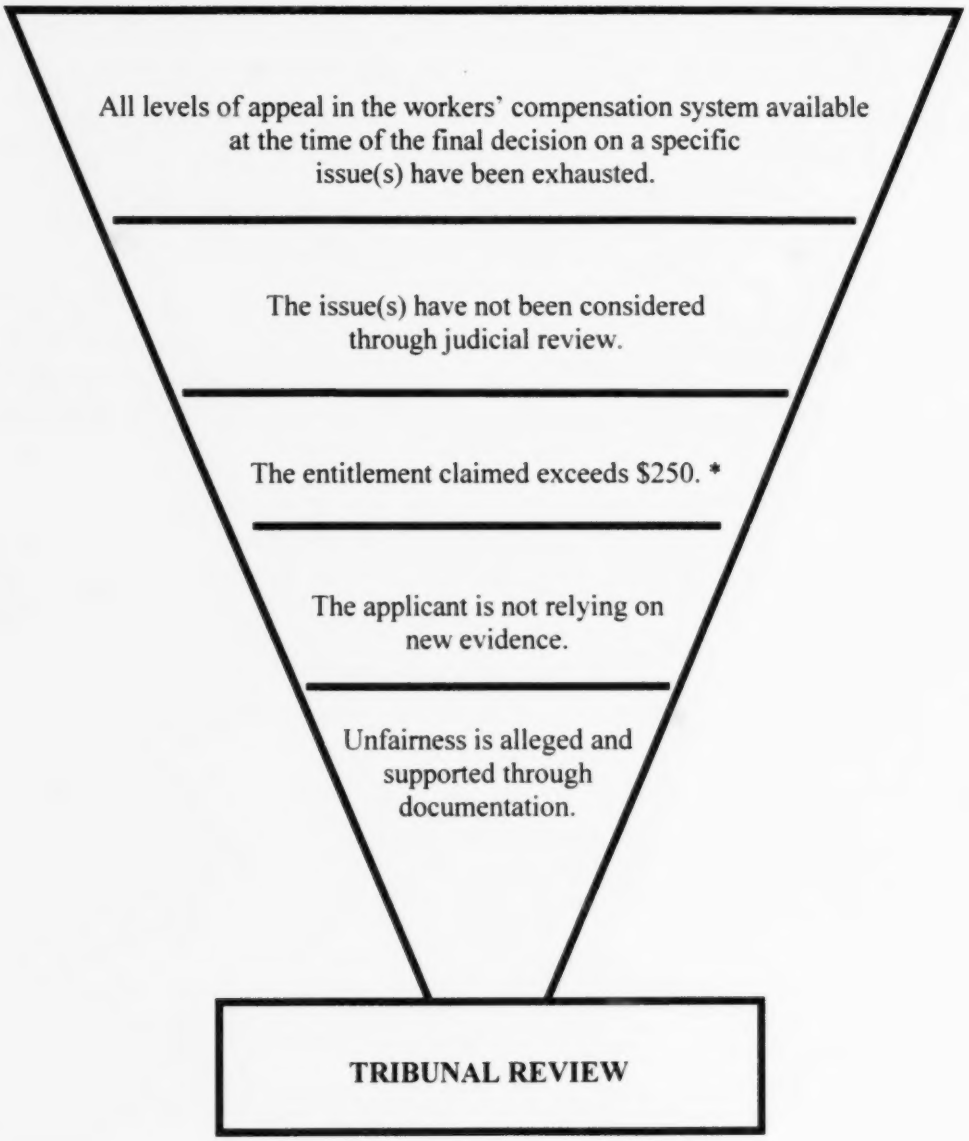
PROPOSED CRITERIA FOR DETERMINING ACCESS TO TRIBUNAL

The Task Force was asked to consider the criteria that should be used to determine who should have access to the tribunal. The Task Force decided access should be available to injured workers and employers. The challenge was to identify criteria that would ensure an individual who alleges unfair treatment would have an opportunity to have his or her case reviewed by a body independent of the WCB. It was not the intent that mere dissatisfaction with the outcome of a WCB or Appeals Commission decision would be sufficient to warrant review, nor was it the intent to revisit every WCB claim in order to find some entitlement a claimant may have missed.

The Task Force recommends the following criteria be applied to all cases to be brought before the tribunal:

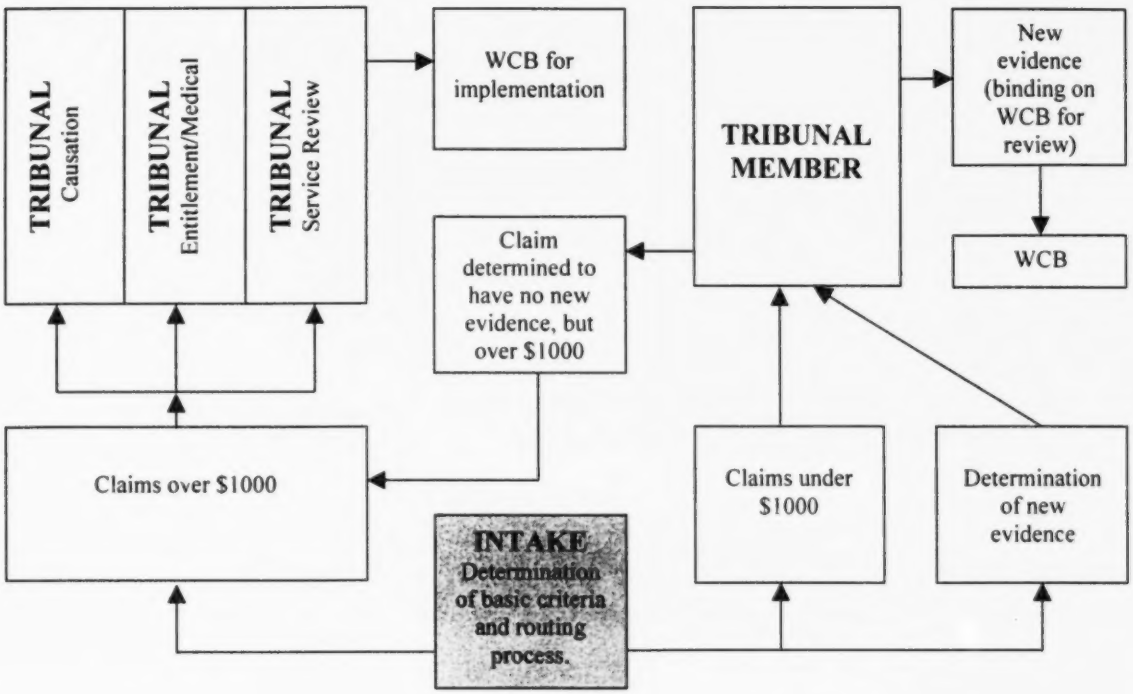
1. All levels of appeal in the workers' compensation system available at the time of the final decision on a specific issue(s) have been exhausted.
2. The issue(s) have not been considered through judicial review.
3. The entitlement claimed exceeds $250.
4. The applicant is not relying on new evidence.
5. Unfairness is alleged and supported through documentation.

PROPOSED CRITERIA FOR DETERMINING ACCESS TO TRIBUNAL


All levels of appeal in the workers' compensation system available at the time of the final decision on a specific issue(s) have been exhausted.
The issue(s) have not been considered through judicial review.
The entitlement claimed exceeds $250. *
The applicant is not relying on new evidence.
Unfairness is alleged and supported through documentation.
TRIBUNAL REVIEW

*(*Claims between $250 and $999 should be allowed access to a documentary hearing by a tribunal member. Applicants with claims equal to or in excess of $1000 should have the option to appear before the tribunal, or have a determination made based on a documentary review.)*

PROPOSED PROCESS FOR THE TRIBUNAL


TRIBUNAL Causation
TRIBUNAL Entitlement/Medical
TRIBUNAL Service Review
WCB for implementation
TRIBUNAL MEMBER
New evidence (binding on WCB for review)
WCB
Claim determined to have no new evidence, but over $1000
Claims over $1000
Claims under $1000
Determination of new evidence
INTAKE Determination of basic criteria and routing process.

KEY POINTS OF PROPOSED PROCESS

Intake should be an administrative function only. There should be no determination of the merits of the case. Applicants should be asked two threshold questions:

- Question #1: Is the claim equal to or in excess of $1000? If yes, applicants should have the option to appear before the tribunal, or have a determination made based on a documentary review. If no, the case should be handled by an individual tribunal member.
- Question #2: Has the applicant suggested that he or she has new evidence?
  - An individual tribunal member should review and determine if what is tendered constitutes new evidence.
  - If yes, the matter is automatically referred to the last body who made the decision. This body should look at the new evidence, review their previous decision, and make a new decision based on this evidence. The deliberations should be subject to legislation, policies and procedures at the time of the injury.

  While consensus was reached that "new evidence" should be treated as though the WCB had made this determination, no consensus was reached as to where new evidence should be forwarded (WCB or Appeals Commission).

- If no, and the claim is equal to or in excess of $1000, applicants should have the option to appear before the tribunal, or have a determination made based on a documentary review. If the claim is between $250 and $999, an individual tribunal member should conduct a documentary hearing.
- If evidence is presented by any party after the evidence submission date, such evidence should not be considered by the tribunal or by the WCB.

To enhance consistency in decisions by allowing for some specialization among tribunal members, claims scheduled for a hearing should be divided into similar categories. Recommended categories are:

- Causation
- Entitlement/Medical
- Service Review

The WCB should receive notice of any claims filed. Interested parties should be notified of, and may participate in, proceedings before the tribunal, to the extent they are so entitled under the rules of procedure existing at the time of these recommendations. When determining who is an interested party, the tribunal may exercise their discretion in a manner similar to the WCB and Appeals Commission under legislation. The WCB should not be considered an interested party unless WCB is the employer of record. (Note: There was no consensus reached on the inclusion of the WCB as an interested party.)

FAIRNESS

The Task Force decided their work would be guided by the principles of fairness.

The tribunal should consider whether there is unfairness in each case, not systemic unfairness. In proving unfairness applicants should show one or more of the following:

Has relevant evidence been considered?
Has there been a failure to consider available evidence?
Has there been a failure to apply legislation, policy, etc. at the time of the claim?
Has there been a serious breach of procedure that violates the process?

The applicants should also show the unfairness created a probability a decision may have been different.

When conducting a hearing the tribunal should consider:

1. Was there unfairness?
2. If yes, did the unfairness effect the outcome?
3. If yes, what is the entitlement?

The tribunal alone should decide whether fairness has prevailed.

All decisions should be referred to the WCB for implementation.

THE DECISION

Each case should be dealt with on its individual merits, promoting consistency in decisions. In the event that the tribunal denies the application, the denial should be made in writing by a tribunal member.

The tribunal should make a final decision on the claim, determine entitlement, and forward a written decision to all interested parties and to the WCB for implementation on the following basis:

- In the case of financial settlements, within 30 days of receipt; or
- In the case of settlements involving services, within 90 days of receipt, unless otherwise provided by the tribunal.

The decision of the tribunal is final and binding. Where payment is made to a successful applicant, the tribunal should obtain a release from the claimant. The decision is not intended to be precedent-setting. The tribunal should not take responsibility for any tax, legal, financial or other implications that may arise as a result of their decision.

ADDITIONAL RECOMMENDATIONS

TRIBUNAL

- The tribunal should consist of credible members, representative of interested parties. Appointments should reflect the principles of employment equity and be representative of the demographics of the province of Alberta. Tribunal members should not be past or present employees of the WCB.
- The tribunal may make rules governing the practice and procedure applicable to matters before them and generally with respect to their operations, subject to the recommendations contained within this report. While specific time limits were discussed, the Task Force agreed it would be more appropriate for the tribunal to have flexibility in setting timelines.

- The tribunal should have sufficient support (technical advisors, independent medical advisor(s) and/or medical panels) available to make their determinations. Such support should be independent of the WCB or any other party(ies) perceived to have an interest in the proceedings.
- In the spirit of timeliness, hearing dates should be scheduled with the consent of all parties. Applications should be reviewed on a first-come, first-served basis. Cases adjourned at the request of an applicant should fall to the end of the list. In order to ensure that an application is not delayed by an interested party, adjournments requested by an interested party should be rescheduled as quickly as practicable.
- Tribunals should be readily available and easily accessible.

COMMUNICATIONS

- Applications should be readily available.
- The implementation of the tribunal should be extensively advertised, as individual notification may be impossible. Advertising should be conducted in print and on the Internet.
- Applications should be accepted for six months commencing from the date of the initial advertising.

OTHER

- Readily available processes should be established at minimal cost to the applicants.
- All information/evidence should be included with the application to the tribunal.
- The tribunal should be operational and ready to start hearing cases by the time the first applications are received.
- Assistance should be made available to applicants throughout the process, i.e. interpreters. This should not include personal representation.
- An issue(s) sent to the WCB based on new evidence should include a recommendation that the matter be dealt with as quickly as possible.
- An issue(s) where no actual damages can be shown, but where the claimant's complaint is about poor conduct on the part of the WCB, should be forwarded to the WCB for their information and action.

COSTS

Notwithstanding the request in the Terms of Reference, the Task Force has not provided an estimate of costs for implementing their recommendations, as there are far too many variables to make a reasonable estimate.

APPENDIX

Terms of Reference: WCB Tribunal Task Force

Meredith Principles

Member Biographies: WCB Tribunal Task Force

TERMS OF REFERENCE

WCB TRIBUNAL TASK FORCE

Purpose

To make recommendations to the Minister of Alberta Human Resources and Employment on the Terms of Reference, process considerations and screening criteria for a one-time tribunal to be established in 2002 to review long standing, contentious Workers' Compensation Board-Alberta claims.

Specific Objectives and Directives of the Task Force

The task force will present its recommendations to the Minister by October 22, 2001. The recommendations should address:

- The **process** the tribunal should use in its review, including:
  - How applicants can apply to have their cases considered
  - Who should be notified of applications
  - Whether applicants will have an opportunity to submit their cases to mediation
  - Whether the decision of the tribunal is final
  - Whether applicants will have access to their files
  - Procedure to be used during hearings
- The **criteria** the tribunal will use to identify cases for review including:
  - Whether all possible appeals have been exhausted
  - Whether the issue could be resolved more appropriately by requesting that the WCB reconsider the matter based on new evidence
  - Whether the issue could be resolved more appropriately by other means if there is new medical evidence
  - Whether there should be a cut off date before which cases will not be considered
  - Whether the policies of the WCB at the time of the original application should apply
  - Whether applicants need to show actual damages suffered to apply
- Estimate of **costs** of implementing the Task Force's recommendations.

MEREDITH PRINCIPLES

The Workers' Compensation Board is guided by a single fundamental principle articulated more than 80 years ago by then Chief Justice of Ontario, Sir William Meredith. In his report on workers' compensation, he outlined what is now commonly referred to as the Meredith Principle:

- Workers receive compensation benefits at no cost for work-related injuries;
- Employers bear the direct cost of compensation and in return receive protection from lawsuits arising from injuries;
- Negligence and fault for the cause of injury are not considerations; and
- A system administered by a neutral agency having exclusive jurisdiction over all matters arising out of the enabling legislation.

Since 1918 the Alberta WCB's mandate has been defined by provincial legislation, the Workers' Compensation Act, consistent with the Meredith Principle. Since then numerous legislative changes have been made to meet the changing needs of a more complex society and economy; however, the basic principle remains as viable today as it was then.

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MEMBER BIOGRAPHIES

WCB TRIBUNAL TASK FORCE

Mike Buffham - Labour

Mike Buffham is the Northern Representative for the Alberta Building Trades Council. He is a journeyman plumber, pipefitter and steamfitter by trade.

Mr. Buffham has been a job steward, foreman, general foreman and superintendent throughout Albertan. He has participated on the Metal Fabricators Board of Directors and other committees, and has been involved with fundraising for Dollars Against Diabetes.

Lorraine Deydey - WCB

Lorraine Deydey has been the Director of Policy Consultation for the Workers' Compensation Board - Alberta since 1998. She is responsible for the WCB stakeholder consultation strategy for policy and legislative review. She has developed and implemented new policies addressing the needs of severely injured workers after consultation with injured workers, labour representatives, employers, health care providers and WCB staff.

Ms. Deydey has also served as the WCB's Director of Claimant Services and Manager of the Office of the Appeals Advisor. As a lawyer she advised and assisted the Appeals Commission and Board Review Committees. She has also worked for the University of Alberta Hospitals as Manager, Legal and Insurance Services, for the Department of Justice, and as a nursing educator and a nurse.

Grace Dykau - Labour

Grace Dykau has been a full-time WCB Union Representative for the Alberta Union of Provincial Employees (AUPE) for eight years. She has a certificate in adult education and has organized conferences and courses for AUPE and others, as well as working on disability management programs.

Ms. Dykau is the AUPE representative to the government Employee Assistance Program and Joint Union/Employer Occupational Health and Safety Committee. She is also the Union Liaison Officer on long-term disability.

Jon Havelock - Public

Jon Havelock is currently the President and Managing Director of Strategic Relations Inc., which provides organizations with strategic roadmaps on government, regulatory structures and competing stakeholder interests. He was MLA for Calgary Shaw from 1993 to 2001, Minister of Economic Development from 1999 to 2001 and Minister of Justice and Attorney General from 1997 to 1999. He also served as Deputy Government House Leader, Government House Leader, Chair for the Standing Policy Committee on Financial Planning, and Chair of the Law and Regulations Committee.

Prior to entering the Legislature, Mr. Havelock had a long career in marketing, real estate, telecommunications and law. He was an Alderman for the City of Calgary and a Calgary Board of Education Trustee. He is a Friend of the Calgary Educational Partnership Foundation.

Michael Joyce - Employer

Michael Joyce has been the Executive Director - Manufacturers' Health and Safety Association since 1994. The Association provides safety training, safety program implementation assistance and WCB assistance to employers in the manufacturing sector. He is responsible to the Manufacturers' Health and Safety Association Board of Directors, consisting of both employers and labour, for the operation of the Association.

Prior to joining the Association, Mr. Joyce had a long career including Human Resource Manager with McCoy Bros., business owner, Operations Superintendent/Surface Mine Manager for Smoky River Coal, as well as many years of experience in the mining industry.

Jayanti Negi - Public

Jayanti Negi has many years of experience working in educational institutions, non-governmental organizations and volunteering on many boards, including representing organizations in government consultations and hearings. She was the Executive Director of the Millwoods Centre for Immigrants and of the Indo-Canadian Women's Association from 1990 to 2001. She has served as a member of the Greater Edmonton Foundation Board as a member of the Advisory Board to the Minister on Gender Integration and Employment Equity for the Department of National Defence, and as the Chief Moderator of the Multicultural Unit, Alberta for the Citizen's Forum.

Ms. Negi holds an Alberta Permanent Teaching Certificate, a Diploma in Education and an M.A. from the University of Alberta. She has received several awards. Notable among these are the Citation for Citizenship from Citizenship and Immigration Canada in 2000, the Citizen of the Year Award from the Canadian Citizenship Federation and the YWCA Women of Distinction Award.

Gene Marie Shematek - Employer

Gene Marie Shematek has been the Director of Occupational Health and Safety for the Calgary Health Region since 1995.

She is currently the Chair of the Occupational Health and Safety Sub-committee of the Calgary Chamber of Commerce Human Resources Committee and has served as the National Safety Advisor to the Canadian Society of Medical Laboratory Science for ten years.

Ms. Shematek holds an MSc(A) degree in Occupational Health Sciences from McGill University and has co-authored Guidelines for Laboratory Safety. She has designed and delivered numerous safety courses, including Occupational Safety Management at McGill University, Safety Program Auditing, Accident Control II, Industrial Hygiene II, and Safety Management at the University of Alberta.

J. Sandy Stevenson, Co-Chair – Employer

Sandy Stevenson is the Suncor Energy Inc. Oil Sands WCB Administrator and has been instrumental in the development and implementation of the Suncor WCB and Medical Accommodation Programs in consultation with management and the Communications, Energy and Paperworkers (CEP) Union. She has been the Chair of the Canadian Association of Petroleum Producers (CAPP) WCB committee since 1997.

Ms. Stevenson is the co-author of Hazard Alert Training and Supplies Canada Inc. Employers' Guide to Workers' Compensation in Alberta, and the Canadian Petroleum Safety Council Industry Recommended Practice Return to Work Program. She was awarded the CAPP Board of Governors Award of Recognition in 1999 and 2001.

Michael Toal, Co-Chair – Labour

Michael Toal is currently the WCB specialist with the United Food and Commercial Workers Union Local 1118, dealing with the majority of meat packing plants throughout Alberta.

Mr. Toal has 18 years of WCB involvement, including experience as a senior appeals advisor at the WCB. He has direct experience with the Appeals Commission as a hearing registrar.

Percy Wickman - Injured Worker

Percy Wickman is a former MLA for Edmonton Rutherford. He is himself an injured worker who went through the WCB process after an injury while employed in the wholesale grocery industry. He has served as Opposition Gaming Critic, an Edmonton City Councillor and Board Member for the Alberta Hospital Association and for Hospital District #24. He was also President of the Alberta Committee of Action Groups of the Disabled, Founding President of the University of Alberta Students' Union Staff CUPE Local, and Vice President of the Northern Alberta Institute of Technology Students' Union.

The industrial incident that resulted in Mr. Wickman being confined to a wheelchair forced him to change direction in life. Unable to return to his former type of employment, he reentered the educational system beginning at grade ten, completing his senior matriculation, business administration and pre-law program. Mr. Wickman has also received a Provincial Achievement Award and was named as one of Canada's Outstanding Young Men.

David Wismer - Alberta Human Resources and Employment

David Wismer joined the Alberta public service on September 3, 1997, as a facilitator with Alberta Labour. In June of 2000 he was appointed Acting Executive Director in charge of the Strategic Services Division of Alberta Human Resources and Employment, and on October 23, 2000, he was confirmed in the position of Executive Director - Workplace Relationships Division. He is responsible for the department's mediation services, workplace relations and facilitation branches, as well as the Appeals Secretariat.

Prior to joining the Alberta public service, Mr. Wismer had an extensive career dealing with labour relations matters. He held elected offices with the Calgary Police Association, the Canadian Police Association and, in addition, arbitrated numerous disputes throughout the province.